

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA

V.

**§
§
§**

**CRIMINAL NO. 18-0082
18-0082S**

VICTOR TANG

**GOVERNMENT'S NOTICE OF A CONFLICT OF INTEREST
AND REQUEST FOR HEARING**

COMES NOW the United States of America, by Ryan Patrick, United States Attorney, and Jim McAlister, Assistant United States Attorney for the Southern District of Texas, and files this request for a hearing to resolve a potential conflict of interest posed by defense counsels' representation of Victor Tang and Tietronix Software Inc. The United States submits the following in support of this motion and request:

I.

On September 17, 2018, Joel Androphy and Zenobia Bivens informed the United States that they represented Victor Tang in the criminal matter set for trial on November 5, 2018. The attorneys filed a notice of appearance on September 21, 2018. Mr. Androphy and Ms. Bivens are the third and fourth attorneys to appear for Mr. Tang and they are the same attorneys that represented the co-defendant, Tietronix Software Inc. (Tietronix) in the previous proceedings before the court.

II.

The United States and Tietronix reached an agreement on the criminal case in August 2018, which required Victor Tang's exclusion from all decisions regarding the company. Tietronix and NASA reached a similar agreement to remove Mr. Tang from all aspects of the company. The negotiation of this agreement involved matters, which were contrary to the interests of Victor Tang, and the future enforcement of the agreement involves matters, which are in conflict with Mr. Tang's interests.

The representation of Mr. Tang by the attorneys, who represented Tietronix, is of greater concern in the criminal trial. The Government anticipates that the testimony of Tietronix employees may be required in the case-in-chief or in rebuttal and virtually all of the incriminating evidence against Mr. Tang is from Tietronix databases. The criminal case against Mr. Tang places the former Tietronix attorneys in a position to cross-examine company employees and challenge company records. It is not difficult to imagine the issues this would raise in trial and on appeal regarding effective cross-examination by attorneys with mixed interests.

III.

The United States recognizes that the defendant should have the counsel of his choice, and the defendant chose Mervan Mosbacher and Grant Scheiner, who have worked on the criminal case since February 2018. The Sixth Amendment to the Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." This guarantee is to ensure that the defendant receives a fair trial and effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984).

The United States recognizes that a defendant may waive his right to conflict-free counsel if the court determines that the waiver is knowing, intelligent and voluntary. U.S. v. Garcia, 517 F.2d 272, 276-277 (5th Cir. 1975). However, the defendant's waiver is not dispositive of the conflict issue, because the federal courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. U.S., 486 U.S. 153, 160, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140 (1988).

The Supreme Court in Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692 (1988) stated "The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of an *actual conflict* but by a showing of a *serious potential for conflict*" and that "...the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Id. at 1697.

IV.

Mr. Tang is not entitled to supplement his defense team with new attorneys that create a conflict of interest issue for him to argue on appeal. The interests of Mr. Tang and Tientronix were not consistent, which caused his removal from the company, and show an *actual conflict*. In addition, a serious *potential for conflict* arises because company employees are fact witnesses in the criminal prosecution and subject to cross-examination by the same attorneys, who discussed privileged matters with them during representation of the company.

WHEREFORE, PREMISES CONSIDERED, the United States respectfully requests that this Honorable Court schedule a hearing to inquire into the actual and/or potential conflict of interest by defense counsels for Victor Tang.

Respectfully submitted,

/s/ Jim McAlister
Jim McAlister
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Government's Notice of Conflict of Interest and Request for a Hearing was sent to the Mervan Mosbacker, Grant Scheiner, Joel Androphy and Zenobia Bivens on September 24, 2017.

/S/ Jim McAlister
Jim McAlister
AUSA-SDTX

CERTIFICATE OF CONFERENCE

I hereby certify that on September 20, 2018 I sent an e-mail to Mervan Mosbacker, Grant Scheiner, Joel Androphy and Zenobia Bivens requesting a discussion regarding the potential conflict of interest with Mr. Androphy and Ms. Bivens representing Mr. Tang. As of September 24, 2017, I have not received a response and Mr. Androphy and Ms. Bivens filed a notice of appearance in Mr. Tang's case on September 21, 2018.

/S/ Jim McAlister
Jim McAlister
AUSA-SDTX

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ORDER

The Court, having considered the United States' Notice of Conflict hereby sets the matter for a Hearing on the _____ day of _____, 2018 at _____.

So ordered and executed on this the _____ day of _____, 2018.

Keith Ellison
United States District Judge